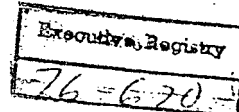




CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D. C.

OFFICE OF THE DIRECTOR



3 February 1976

MEMORANDUM FOR: Morning Meeting Participants

Jack Marsh asked for any additional comments that we might have on S 2893 (the Church Committee's oversight bill, attachment A). The purpose of this exercise is to develop an Administration position regarding this bill as well as to possibly develop our own bill for a joint committee.

I would appreciate your written comments by Thursday Noon so that we can discuss our views prior to submitting them to the White House.

Re attachment B: We have been given until close of business on Thursday to respond to the Restrictions Executive Order. I hope that everyone will be in a position to discuss it at the meeting on Thursday.

STATINTL


Special Counsel to the Director

Attachments:
2 as stated

*Feedback
Announce 9:00 AM*

COMMENTS ON S. 2893 ESTABLISHING A
SENATE INTELLIGENCE COMMITTEE

Sections 1 and 2 Comment: The terms "oversight" and "provide vigilant legislative oversight" represent a significant departure from the usual charters of Congressional committees. They imply a closer supervision of Executive Branch activities than seems appropriate under our Constitutional system.

Suggested Provision: Substitute "Committee" for "oversight" in Section 1 and "maintain vigilant legislative review" for "maintain vigilant legislative oversight over" in Section 2.

Section 3 Comment: This provision breaks the legislation into two parts: (a) a statute (presumably Sections 2 and 13-19) and (b) a Senate resolution. The strategy seems designed to require the President to "sign" or "veto" the document as a whole. Since some of the most objectionable provisions are in those sections specified as "an exercise of a rule-making power of the Senate, "the constitutionality of a "veto" based on objections to those sections could presumably be challenged. On the other hand, the President's signature on a one-House resolution seems Constitutionally inappropriate. A signature based on acceptability of the "statute" sections only would inevitably be taken as approval of (or at least acquiescence in) the "Senate Resolution" sections as well.

Suggested Provision: The difficulties referred to above could be avoided by dividing the legislation into a resolution and a statute. Such a division would avoid the problem for the President of having to determine whether or not to accept Section 10, which gives the Senate declassification authority, and other objectionable sections.

Section 7 Comment: The information covered by this provision limiting disclosure would not encompass all sensitive information likely to be held by the Committee. Much substantive intelligence would not "relate" to the activities of the intelligence agencies.

Also, neither this section nor any other section contains a provision allowing referral to the Standards and Conduct Committee of cases of unauthorized disclosures for disciplinary action. Previous drafts contained such a provision.

Suggested Provision: There are several options for alternate language to be substituted for the words "relating to the activities of the Central Intelligence Agency or any other department or agency of the United States engaged in intelligence activities":

(a) Delete the above words; insert the word "sensitive" before "information". This represents a broad category of information.

However, no clear test is provided as to whether certain information is

covered. Leakers could argue that information, even if properly classified and clearly relating to intelligence activities, was not truly "sensitive".

(b) Delete the above words; insert the word "classified" before "information". Under this option, the existence of protection depends on the formal act of classification, presumably by the Executive Branch.

(c) Delete the above words; insert in their place the words "whose unauthorized disclosure could reasonably be expected to cause damage to the national security." This option embodies the test of classifiability taken from E. O. 11652, but presumably the Committee and not the Executive would make the decision as to what information passes this test. This option also protects classified information appearing on a document which was inadvertently not classified.

Section 10 Comment: Although Section 10's procedure for the Senate to reveal information that the Executive Branch wishes to keep confidential may in practice constitute an improvement over the present system that allows a Committee alone to make such declassifications,

such an official recognition of one branch of Congress' authority to make information public may raise Constitutional problems and detract from Presidential authority.

The standard of certification should either be made "important to national interests" or deleted altogether. The advantage of deletion of the standard would be that the President could make his arguments for nondisclosure unfettered by a standard which might be inappropriate in a particular case. For instance, release of files on what some public official did on a 1937 trip to Moscow would not be gravely damaging to national security, but could be undesirable nonetheless.

This is my interpretation
The language of this provision is somewhat ambiguous and could be interpreted as allowing the Committee to decline to refer a Presidential certification to the full Senate and merely release the contested information on its own. See Section 10(a)(1) and (2). If this result is intended, the provision becomes much more objectionable.

The language on Senate declassification should be changed to require an affirmative act by two-thirds of the Senators to disclose information. Such a determination by the Senate reversing a finding of the President would be similar to a veto, which requires a two-thirds vote.

Section 12 Comment: This section makes no exception for the return of documents which were provided "on loan" to the Senate Select Committee.

Section 13(a) Comment: The bill states that the Intelligence Committee is to be kept "fully and currently" informed. This proviso would only be as strong as the Committee chairman, who would periodically have to agree with each agency head about the means by which the Committee would be kept informed. However, this language seems to inject Congress into day-to-day government operations to a greater degree than is appropriate under our Constitutional system.

Section 13 (b) Comment: Despite the language in this section that the Executive Branch will furnish any information to the Committee, the staff of the Senate Select Committee agreed that the President will continue to be able to invoke Executive Privilege to withhold documents. Such a recognition of this privilege should be explicit. Such a recognition, however, would in itself not answer worries that Executive Privilege will not very effectively protect some types of information such as files on criminal investigations.

Section 13 (c) Comment: This section requires that the Committee be given prior notice and be fully informed of any significant covert or clandestine operation abroad. Several problems exist: (1) prior notification requirements would unduly limit Executive flexibility in emergency situation; (2) the requirement that the Committee be fully informed enables Congress to claim always that it was not given enough prior information; (3) the definition of covert or clandestine operations is unclear; (4) any prior notice requirement would make possible unauthorized disclosures that would force cancellation of the activity.

Two alternatives for dealing with this problem would be preferable. The first option would delete the section altogether, relying on the Committee's authority in Section 13 (a) to instruct agency heads to keep it fully and currently informed as a means of receiving whatever notification was considered appropriate. The second option would be to limit this section's coverage explicitly to covert actions and to couple the section with an explicit repeal of the Hughes-Ryan requirement that six committees be briefed in a timely manner.

Section 14 Comments: The current drafts authorization requirement is for periodic, but not necessarily annual, authorizations. Any authorization process will of course encourage more legislative interference in the way the intelligence community is run, but the Senate apparently sees a clear need for this closer scrutiny. There would, of course, be the problem of continuing secrecy of intelligence budgets under an authorization system. One alternative would be to require merely authorization of one aggregate sum for all activities covered in subsections (A) through (F).

— This section also presents the difficulty of distinguishing between the "national" and "tactical" activities of the Defense Department; this is an issue that would have to be negotiated periodically between the Committee and DoD.

Key Problems in Draft Bill on Intelligence Oversight of Senate Select Committee

- Release of Classified Information by Committee or Full Senate.

Section 10 establishes a procedure whereby, despite opposition by the President, the Senate (by a majority vote) may reveal classified information. The Committee itself may disclose such information unless the President certifies that "the threat to national security posed by such disclosure outweighs any public interest in disclosure." (The draft of January 23 uses different language in this provision than appears in earlier drafts. It is somewhat ambiguous but could be interpreted to allow the Committee to decline to refer a Presidential certification to the full Senate and merely release the contested information on its own. See Section 10 (a)(1) and (2). If this result is intended, the new draft is substantially more objectionable to the Executive Branch than the earlier ones.)

This provision, even if construed to require full Senate approval for information release, presents a serious constitutional question, especially when viewed together with other provisions of the bill requiring the executive to keep the Committee "fully and currently informed" and allow it access to "any" information. It can be argued

that such a provision would frustrate the President's exercise of his powers as the nation's sole organ in foreign affairs and as commander-in-chief.

On a more practical level, it is unrealistic to think that, in any case where the full Senate considers in secret session whether to release a certain piece of information, the information in question would not appear in the press on the following day.

- Requirement that Department Heads Keep Committee "Fully and Currently Informed" and Allow it Access to "Any" Information in their Possession.

Section 13 (a) and (b) would have the force of law and not merely that of a Senate Rule. It imposes these two affirmative obligations on the Executive Branch in completely unqualified terms. Even if it were practically possible to comply with these obligations, substantial constitutional problems would remain. First, the section makes no exception for documents or information which are covered by the doctrine of Executive Privilege recognized in U.S. v. Nixon, 418 U.S. 683 (1974). Second, practical experience and Section 10 of this bill suggest that much information passed to this Committee would eventually be made public. It is arguable that the President has a Constitutional obligation to decline

to supply sensitive information to a Congressional Committee under circumstances indicating a substantial probability of its disclosure.

- Requirement for Prior Notice of Significant Covert or Clandestine Operation in Foreign Countries

Section 13 (c) (carrying the force of law) states that no departments or agencies shall "engage in, directly or indirectly, any significant covert or clandestine operation in foreign countries" until the Intelligence Committee has been "fully informed." Several problems exist with this section.

First, the definition of "significant covert or clandestine operation" is unclear. The subsection states that it does not apply to "activities intended solely for collecting necessary intelligence." It appears that the Committee would require prior notice only for covert actions, but that is not clear.

Second, the bill has no provision for repeal of the Hughes Amendment, so the result is to add a seventh committee to the Congressional committees aware of covert actions.

Third, this requirement, combined with the absence of sanctions on Committee members would allow any member to exercise a unilateral veto of a covert action through disclosure of any planned activity reported to the Committee. If, as can be argued with some force, the President derives authority to conduct covert action and clandestine intelligence collection from the Constitution, this provision would seem to be constitutionally invalid.

- Law/Senate Rule Hybridization

Section 3 breaks the legislation into two parts: (a) a statute and (b) a Senate resolution. The strategy seems designed to require the President to "sign" or "veto" the document as a whole. Since some of the most objectionable provisions are in those sections specified as "an exercise of a rule-making power of the Senate," the constitutionality of a "veto" based on objections to those sections could presumably be challenged. On the other hand, the President's signature on a one-House resolution seems constitutionally inappropriate. A signature based on acceptability of the "statute" sections only would inevitably be taken as approval of (or at least acquiescence in) the "Senate Resolution" sections as well.

- Sanctions for Disclosure

Section 8 (b) of the previous draft detailed possible sanctions against Senators or their staffs for unauthorized disclosures of sensitive information. This section has been deleted.